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In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's rule that a district court must enter a preliminary injunction whenever it finds a likely violation of an environmental statute, unless the injunction itself would cause environmental harm, conflicts with *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and decisions from other circuits that require a balancing of the equities.

2. Whether Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, which requires federal land managers to determine whether proposed dispositions of public lands in Alaska "would significantly restrict subsistence uses" and, if so, to follow certain procedures and make certain findings prior to any such disposition, applies to the outer continental shelf (OCS), when the Act defines "public lands" as lands "the title to which is in the United States" and which are "in Alaska."

3. Whether the court of appeals' ruling that neither OCS leasing nor exploration may proceed until the Secretary of the Interior complies with Section 810's procedural requirements for all stages of the OCS program, including development and production, conflicts with *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984).

4. Whether the court of appeals' decision applying ANILCA to the OCS should be given retroactive effect, thereby casting a cloud over more than 600 previously-issued OCS leases and $4.2 billion in bonus bids received by the Treasury for those leases.

PARTIES TO THE PROCEEDING

The petitioners are Donald P. Hodel, Secretary of the Interior, and the United States Department of the Interior. The respondents are:

People of the Village of Gambell
People of the Village of Stebbins
Nunam Kitlutsisti
Amoco Productions Company
ARCO Alaska, Inc.
Exxon Corporation
Mobil Exploration & Producing Services, Inc.
Sohio Alaska Petroleum Company
Shell Western E & P, Inc.
Texaco, Inc.
Union Oil Company of California

The oil company respondents have filed their own petition for a writ of certiorari (No. 85-1239 (filed Jan. 22, 1986)), seeking review of the same judgment addressed in this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the United States Department of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-34a) is reported at 774 F.2d 1414. The opinion of the district court (App. 35a-43a) is unreported. An earlier opinion of the court of appeals in this case (App. 44a-67a) is reported at 746 F.2d 572. An earlier opinion of the district court (App. 68a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 79a-80a) was entered on October 25, 1985. On January 13, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, are set forth in the appendix to this petition at 116a-122a.

STATEMENT

This case concerns exploratory drilling by lessees of the federal government in two outer continental shelf (OCS) leasing areas in the Bering Sea. The OCS off Alaska is more than twice as large as the entire OCS off the 48 contiguous states and is of critical importance to the Department of the Interior's efforts to implement the policy of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA), 43 U.S.C. 1331 *et seq.*, " 'to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the [OCS].' " *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981) (quoting H.R. Rep. 95-590, 95th Cong., 1st Sess. 53 (1977)); see also 43 U.S.C. 1332(3), 1802(1) and (9). The areas involved in this case are Norton Sound (Lease Sale 57) and the Navarin Basin (Lease Sale 83). A divided panel of the court of appeals reversed the district court's denial of a preliminary injunction against exploratory activities in these two areas on the ground that respondents' showing of a likelihood of success on their claim that the Secretary of the Interior violated Section 810 of ANILCA, 16 U.S.C. 3120, *required* the issuance of an injunction, notwithstanding the countervailing equities and public interest considerations that led the district court to deny injunctive relief.

1. *The challenge to Lease Sale 57 (Norton Sound).* – Lease Sale 57, which took place in March 1983, was preceded by intensive study of possible environmental

impacts, including impacts on subsistence uses.[1] The environmental impact statement (EIS) for Lease Sale 57 gave considerable attention to possible impacts on subsistence uses (EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296) and concluded that significant disruption of subsistence uses from all phases of OCS operations was "unlikely" (*id.* at 142). However, the specific procedures of Section 810 of ANILCA, relating to dispositions of public lands that "would significantly restrict subsistence uses," were not followed, because Interior was of the view that ANILCA, which applies only to public lands "situated in Alaska," the "title to which is in the United States," 16 U.S.C. 3102(2) and (3), does not apply to the OCS.

The native villages of Gambell and Stebbins filed a complaint on March 4, 1983, seeking injunctive relief against Lease Sale 57. The complaint charged that the Secretary had failed to comply with Section 810 and that the sale conflicted with the villagers' alleged aboriginal rights to the OCS. The district court denied the villages' motion for a preliminary injunction, and the sale was held on March 15, 1983. On April 4, 1983, the district court denied the villages' motion for summary judgment, holding that there was "no persuasive evidence that Congress intended the phrase 'public lands', as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska" (App. 69a). The court also held that the villagers had no aboriginal rights to the OCS (*ibid.*). Based on these rulings, the district court granted summary judg-

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[1] The term "subsistence uses" is defined in Section 803 of ANILCA, 16 U.S.C. 3113, as "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade."

ment in favor of the government and the intervenor oil companies. The villages appealed and moved in the Ninth Circuit to enjoin the issuance of leases pending appeal. That motion was denied by a panel of the court of appeals on May 10, 1983. On that same day, 59 tracts were leased for bonus payments totalling $317,873,372.

2. *Approval of exploration plans for Norton Sound.*—Subsequent to the district court's ruling, but prior to the court of appeals' decision on the merits of the villages' appeal, intervenors Exxon and ARCO (petitioners in No. 85-1239) submitted exploration plans covering a number of the tracts in Norton Sound on which they had received leases. Exploration is the third of the "four distinct statutory stages to developing an offshore oil well" created by the 1978 amendments to the OCSLA. *Secretary of the Interior* v. *California*, 464 U.S. 312, 337 (1984).[2] Exploration may proceed only after the lessees demonstrate compliance with any applicable state management program under the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, and that the proposed activities probably will not " 'cause serious harm or damage . . . to the marine, coastal, or human environment . . . .' " *Secretary of the Interior* v. *California*, 464 U.S. at 339 (quoting 43 U.S.C. 1334(a)(2)(A)(i) and 1340(c)(1)). The Secretary's approval of an exploration plan is reviewable only in the court of appeals for the circuit in which the affected state is located, and any challenge must be filed within 60 days of the approval. 43 U.S.C. 1349(c)(2) and (3). Exxon's exploration plan was approved by the Secretary on December 28, 1983, and ARCO's plan was approved on March 19, 1984. Neither the villages nor anyone else challenged the Secretary's

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[2] The four stages of the OCS process are: (1) planning a five-year nationwide leasing program (43 U.S.C. 1344); (2) conducting a lease sale (43 U.S.C. 1337(a)); (3) exploration (43 U.S.C. 1340); and (4) development and production (43 U.S.C. 1351).

approval of the exploration plans within the 60-day period provided by 43 U.S.C. 1349(c). Accordingly, exploration proceeded in Norton Sound during the summer of 1984 with the drilling of four wells.

3. *The Court of Appeals' decision in Gambell I.*—On November 2, 1984, the court of appeals affirmed the district court's rejection of the villagers' aboriginal title claim, but reversed the district court's holding that Section 810 of ANILCA does not apply to the OCS. *People of the Village of Gambell* v. *Clark* (*Gambell I*), 746 F.2d 572 (9th Cir. 1984) (App. 44a-65a). The court of appeals did not reach the question whether Interior had substantially complied with Section 810 in the course of complying with other environmental statutes or, if not, whether the Sale 57 leases should be voided. Instead, the court remanded the case to the district court for a determination of these issues and the framing of an appropriate remedy (App. 65a).

4. *Interior's post*-Gambell I *subsistence evaluation for Lease Sale 57.*—In accordance with the Ninth Circuit's decision in *Gambell I,* Interior began to integrate the requirements of Section 810 into its Alaska OCS leasing program. Section 810 imposes a two-step procedure on federal land managers in Alaska whenever they propose to "withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands" (16 U.S.C. 3120(a)). Section 810(a) first requires the land manager to "evaluate": (1) the effect of the proposal on subsistence uses and needs; (2) the availability of other lands for the purposes sought to be achieved; and (3) other alternatives that would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. If this evaluation reveals that the proposed action "would significantly restrict subsistence uses," the land manager must engage in additional procedures set forth in Section 810(a)(1) through (3). These procedures include notice, a hearing, and the making of specified findings.

With respect to Lease Sale 57, Interior determined to re-evaluate subsistence issues, including those already studied in the EIS for the sale. Interior's post-sale Section 810 evaluation was issued on April 22, 1985 (App. 81a-106a). The evaluation document followed the stage-by-stage approach set out in the OCSLA, noting that a Section 810 evaluation for a lease sale need consider only the effects on subsistence uses of the lease sale itself and not the effects of exploration or development and production (App. 84a). See generally *Secretary of the Interior* v. *California*, 464 U.S. at 337-341. The evaluation document nonetheless analyzed, to the extent feasible, possible impacts that might arise at those future stages of the OCS process (App. 84a).

Insofar as the lease sale itself was concerned, the evaluation document found that the execution of leases (which permits lessees to conduct only limited preliminary activities on the OCS) had not and would not significantly restrict subsistence uses (App. 103a). The evaluation document further found that the exploration stage activities that had occurred in Norton Sound to date had not significantly restricted subsistence uses and were not likely to do so in the future (App. 103a, 106a). (The evaluation document noted that a separate Section 810 evaluation would be performed for each subsequent exploration plan submitted for the Secretary's approval (App. 85a).) Finally, the evaluation document found that, if development and production activities were ever proposed in the Lease Sale 57 area, they might, in the event of a major oil spill, significantly restrict subsistence uses for limited periods in limited areas (App. 92a-99a). The evaluation document stressed that more definitive judgments could be made only if and when a particular development and production plan were submitted for approval and that a separate Section 810 evaluation would be prepared at that time (App. 85a).

5. *Lease Sale 83 (Navarin Basin).*—Lease Sale 83 was conducted on April 17, 1984, without litigation challenge and resulted in the leasing of 163 tracts for total bonus payments of $516,317,331.[3] The Navarin Basin is so far from land—more than 250 miles from the nearest inhabited land (St. Lawrence Island) and more than 350 miles from the mainland—that no Native subsistence harvesting occurs there. Nevertheless, the possible subsistence effects of Lease Sale 83 were examined in the lease sale EIS (EIS IV-20 to IV-68, III-60 to III-75, IV-81 to IV-90, IV-106, IV-112) and found to be negligible (*id.* at IV-83 to IV-84).

Interior approved exploration plans for the Navarin Basin on December 28, 1984 (Exxon), January 23, 1985 (ARCO), and April 19, 1985 (Amoco). These approvals were made after the court of appeals' ruling in *Gambell I* and accordingly contained explicit Section 810 evaluations. See, *e.g.*, App. 107a-115a (Section 810 evaluation for Exxon's exploration plan). No challenges to these approvals were brought within the 60-day period provided in 43 U.S.C. 1349(c)(3)(C). In reliance on the approvals, the three companies proceeded to commit more than $60 million in preparation for the 1985 drilling season.

6. *Proceedings on remand in the district court.*—On April 3, 1985, the villages returned to the district court seeking a preliminary injunction against exploratory activities in the Lease Sale 57 area. By that time, intervenor Exxon had committed more than $10 million toward the drilling of two exploratory wells in Norton Sound during the ice-free months of 1985.

On April 23, 1985, more than a year after Sale 83 had been held, the Village of Gambell, joined by Nunam Kitlutsisti, an organization of Yukon Delta Natives, filed

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[3] High bids of $108,174,000 were received on tracts that are claimed by both the United States and the Soviet Union. The money received for those tracts is being held in escrow pending discussions between the two nations.

a complaint seeking to void Lease Sale 83 and enjoin imminent exploratory drilling in the Navarin Basin. The Lease Sale 83 complaint, like that in the Lease Sale 57 litigation, alleged violations of Section 810 and also added a claim that the Secretary, by conducting the lease sale, had breached trust duties owed to the Natives.

After consolidating the requests for preliminary injunctions in the Sale 57 and Sale 83 cases, the district court denied the motions on May 23, 1985 (App. 35a-43a). The court found that the villages had "established a strong likelihood of success on the merits" (App. 43a). Specifically, the court reasoned that even though the Secretary's environmental impact statements for both sales had included the type of evaluation of subsistence impacts called for by Section 810, those evaluations were necessarily deficient because the Secretary "did not have the policy precepts of ANILCA in mind at the time of evaluation" (App. 37a-38a). The court went on to examine Interior's post-sale ANILCA compliance document for Lease Sale 57 (see page 6, *supra*). The court did not question that this document adequately evaluated the effects of leasing on subsistence uses, nor did it question Interior's conclusion that neither the leasing nor the exploration stage of the OCS process would significantly restrict subsistence uses. However, the court concluded that the notice, hearing, and findings requirements of Section 810(a)(1)-(3) should have been followed, in light of Interior's determination that a significant restriction on subsistence uses might occur at the development and production stage, should that stage ever be reached (App. 40a-41a).

The district court nevertheless concluded for several reasons that the equities weighed against the issuance of an injunction prohibiting continued exploratory activities. First, the OCSLA gives the Secretary continuing power to control and shape the offshore leasing process; hence, if compliance with the requirements of Section 810 reveals a

need to alter leasing conditions or configurations, the Secretary retains the power to do so (App. 43a). Second, it was apparent that the only activity planned at this time, exploration, would not significantly restrict subsistence uses (*ibid.*). Third, the national interest in expedited OCS exploration declared in 43 U.S.C. 1332(3) would be frustrated by an injunction (App. 43a).

7. *The court of appeals' decision in* Gambell II. – The villages took an appeal from the district court's denial of injunctive relief and sought an emergency injunction against the ongoing exploratory drilling in the two sale areas. On June 6, 1985, a panel of the court of appeals denied the motion, but directed the Secretary, in conjunction with the intervenor oil companies, to file a "hold harmless agreement that will protect [the villages] from any consequences resulting from significant restrictions upon subsistence uses by [the villages] of their lands" (App. 70a). A hold harmless agreement was submitted to the court of appeals on June 13, 1985 (App. 72a-76a) and approved by the court, with minor revisions, on June 21, 1985 (App. 77a-78a).

Exploratory drilling proceeded without incident in both sale areas throughout the summer and fall of 1985. On October 25, 1985, a divided panel of the court of appeals issued the decision here sought to be reviewed, in which it reversed the district court's denial of preliminary injunctive relief (*Gambell II*, App. 1a-34a). The court of appeals affirmed the district court's ruling that the villages had established a strong likelihood of success on the merits, agreeing with the lower court that the Secretary could not have substantially complied with Section 810 of ANILCA because he did not have its mandate clearly in mind when he decided to conduct the lease sales (App. 8a-12a).[4]

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[4] Inexplicably, the court of appeals stated (App. 9a) that "in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses

Turning to the post-sale Section 810 evaluation for Lease Sale 57 (see page 6, *supra*), the court of appeals agreed with the district court that Interior's finding that development and production activities, if they ever occur, "may significantly restrict subsistence uses in certain areas" (App. 85a) required the Secretary to conduct the hearing and make the findings required by Section 810(a)(1)-(3) prior to conducting the lease sales. The court distinguished *Secretary of the Interior* v. *California, supra*, on the ground that that decision did not deal with ANILCA (App. 13a).

The court of appeals next held that the equitable considerations relied upon by the district court in denying a preliminary injunction did not "excuse its duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail [on the merits]" (App. 15a). The court of appeals did not disagree with the district court's finding that "exploration will not significantly restrict subsistence resources" (*ibid.*). Instead, the court ruled that " '[i]rreparable damage is presumed' " whenever an agency has failed to comply with an environmental statute. App. 15a (quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). Under this essentially irrebutable presumption, an injunction *must* issue whenever a court finds "a substantive procedural violation of an environmental statute" (or preliminarily finds it likely that such a violation has occurred), save in "unusual circumstances" (App. 15a, 19a). The court of appeals limited "unusual circumstances" to situations in which enjoining a project from proceeding in likely violation of an environmental statute would cause

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and needs of the Native Alaskans," even though the district court had found the opposite, relying on a record that clearly showed that the Secretary had performed detailed subsistence evaluations in the environmental impact statements prepared for the two sales (App. 37a, 41a-42a).

more environmental harm than good (App. 17a) or would interfere with certain types of long-term contracts (App. 16a, 19a). In this case, the court of appeals held that the district court erred by finding "unusual circumstances" in the harm an injunction would cause to the national interest in expedited OCS development and in the ability of the Secretary to alter the configuration of OCS activities if ANILCA subsistence studies show that to be necessary at any future stage of exploration or development (App. 16a, 19a).

The court of appeals rejected the district court's findings with respect to the public interest, which were bottomed on the policy declared by Congress in the OCSLA to expedite exploration of the OCS. The court concluded that ANILCA effectively superseded this congressional policy. App. 20a-21a. Finally, the court rejected arguments that it was improper to apply *Gambell I* retroactively to Lease Sale 83 (App. 22a-25a) and that the villages' challenge to Lease Sale 83 was barred by laches (App. 25a-26a).

District Judge Dimmick, sitting by designation, dissented (App. 28a-34a). She noted that the government and the oil company intervenors "presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources," as well as evidence that the oil companies would have lost up to $70 million if the preliminary injunction had been granted (App. 30a). In contrast, the villages had presented only evidence of "speculative harm" (*ibid.*). The dissent explained (App. 29a) that the majority's "rigid approach to the issuance of an injunction" was contrary to *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305 (1982). The dissent also disagreed (App. 31a-32a) with the majority's retroactive application of *Gambell I* to Lease Sale 83.

REASONS FOR GRANTING THE PETITION

The decision below poses a serious threat to the congressionally-mandated OCS leasing program and, more broadly, to all federal programs challenged on environmental grounds in the Ninth Circuit. The immediate effect of the decision is to halt exploratory drilling in two basins off Alaska and throw into doubt the ability of lessees on hundreds of other OCS tracts off Alaska to carry out exploration activities (see pages 20-21, *infra*). More generally, the Ninth Circuit's rule that a showing of a likelihood of success on the merits of a claim that an environmental statute has been violated *requires* the issuance of a preliminary injunction without any consideration of the competing equities or, indeed, any showing that the requested injunction will serve any purpose in remedying the statutory violation claimed clearly portends significant disruptions of federal programs and projects throughout the large portion of the country under the jurisdiction of the Ninth Circuit. The court's unprecedented per se injunction rule is directly contrary to this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), as well as numerous decisions from other circuits, and it requires correction by this Court.

Of equal concern is the court of appeals' unwarranted extension of ANILCA to the OCS and its interpretation of Section 810 of that Act as requiring consideration even before a lease sale is held of subsistence impacts that might or might not occur at future stages of the OCS process. As this Court recognized in *Secretary of the Interior* v. *California*, 464 U.S. 312, 341 (1984), the premature litigation that such a ruling will generate was precisely what Congress intended to preclude when it divided the OCS process into four distinct stages and provided the

Secretary with full authority to control lessees' activities at each stage. Accordingly, review by this Court is warranted.[5]

1. a. In *Romero-Barcelo*, the First Circuit had ruled that the district court was *required* to issue a permanent injunction upon finding that the Navy was in violation of the Clean Water Act and that the district court "erred in undertaking a traditional balancing of the parties' competing interests" (456 U.S. at 311). This Court reversed (*ibid.*). In the course of its opinion, the Court thoroughly reviewed the basic principles of equity jurisprudence in the federal courts. Starting with the proposition that an injunction " 'is not a remedy which issues as of course' " (456 U.S. at 311 (quoting *Harrisonville* v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-338 (1933)), the Court stated that the foundation for "injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies" (456 U.S. at 312). Moreover, balancing of the equities is essential: "Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims" (456 U.S. at 312 (quoting *Hecht Co.* v. Bowles, 321 U.S. 321, 329 (1944)). " 'The essence of equity jurisdiction,' " the Court stated, is "to mould each decree

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[5] It is extremely unlikely that a conflict among the circuits will develop on the ANILCA issues, because that Act affects only Alaska. Although potential plaintiffs theoretically could bring suit in the District of Columbia, they obviously are unlikely to do so in light of the expansive view of the statute already taken by the Ninth Circuit.

We also note that the Ninth Circuit's construction of the statute, although rendered in the context of an appeal from the denial of preliminary relief, effectively represents the court of appeals' final conclusions on the merits of the ANILCA issues. Accordingly, in light of the deleterious consequences of the court's erroneous interpretation, review is warranted at this time.

to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.' " *Ibid.* Finally, the Court specified that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction" (456 U.S. at 312).

These principles apply with even greater force when the question is whether to grant a preliminary injunction. The court will not have had an opportunity fully to consider the merits of the case, thereby making the sole justification for the exercise of equitable power the maintenance of the status quo pending completion of the litigation. Cf. *Scripps-Howard Radio, Inc.* v. FCC, 316 U.S. 4, 9-11 (1942). Accordingly, the plaintiff must demonstrate that, in the absence of a preliminary injunction, it will suffer actual and substantial injury that is truly irreparable, *i.e.*, incapable of remedy by relief ordered at the termination of the litigation. See *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). Moreover, the court must consider the injury to the defendants and the public interest that would be occasioned by the entry of even a temporary injunction. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). In an appropriate case, irreparable damage to the public interest will justify withholding preliminary relief even though the burden on the plaintiff is substantial. *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944). Taken together, these considerations constitute the familiar four-part test that traditionally has governed the issuance of preliminary injunctions, stays, and other forms of temporary equitable relief in the federal courts. See, *e.g.*, *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), cited in *Sampson* v. *Murray*, 415 U.S. at 84.[6]

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[6] In *Virginia Petroleum Jobbers*, 259 F.2d at 925, the court articulated the test as follows: (1) Whether the petitioner has made a strong showing that it is likely to prevail on the merits; (2) whether the petitioner has shown that without such relief, it will be irreparably injured; (3) whether the issuance of a stay would substantially harm

The Ninth Circuit has rejected these well established principles governing the exercise of equitable power by federal courts in favor of a rule that inflexibly requires a court to enter the injunction requested by the plaintiffs whenever it finds a violation, or probable violation, of an environmental statute (App. 14a-19a).[7] The unwarranted

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other parties; and (4) whether injunctive relief would be in the public interest.

In recent years, several lower federal courts, including the Ninth Circuit, have adopted an "alternative" test that requires a less convincing showing of success on the merits if the balance of irreparable injury tilts decidedly in favor of the applicant for preliminary relief. See, *e.g.*, *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975). In the Ninth Circuit, either test is "satisfactory." *Benda* v. *Grand Lodge of IAM*, 584 F.2d 308, 315 (1978), cert. dismissed, 441 U.S. 937 (1979).

The Ninth Circuit recently combined the alternative test for preliminary relief with its per se injunction rule for alleged violations of environmental statutes in a manner that would seem to entitle any plaintiff with a non-frivolous complaint to the automatic issuance of a preliminary injunction. In *Tenakee Springs* v. *Block*, 778 F.2d 1402 (1985), petition for reh'g pending, the court found that the presence of "serious questions" concerning compliance with the National Environmental Policy Act was sufficient to invoke the rule that "irreparable injury may be presumed when [a] NEPA violation is found" (778 F.2d at 1407) and ordered the district court to issue a preliminary injunction (*id.* at 1408). This suggests that district courts in the Ninth Circuit are now required to enter preliminary injunctions against federal programs or projects even if the plaintiffs have done no more than raise a "serious question" concerning compliance with an environmental statute.

[7] As noted (see pages 10-11, *supra*), the Ninth Circuit's rule admits of only two exceptions. An injunction may be denied if injunctive relief would itself cause irreparable harm to the environment or if such relief would interfere with certain types of long-term contracts (App. 16a, 19a). The contractual-interference exception is evidently quite narrow, because the court of appeals did not apply it in this case despite the fact that the injunction against exploratory operations interferes with the intervenor oil companies' right to explore their leases pursuant to their contracts with the government and their approved exploration plans.

consequences of the Ninth Circuit's rigid approach to injunctive relief in environmental suits are well illustrated by this case. The asserted violations of ANILCA that triggered the per se injunction rule were perceived deficiencies in Interior's consideration of subsistence impacts at the time the Secretary decided to conduct Lease Sale 57 and Lease Sale 83.[8] Yet, in ordering that "all activities in connection with Lease Sale 57 and Lease Sale 83" be enjoined (App. 27a), the court of appeals gave no consideration to the fact that, at the present time, the only activities in the two sale areas are exploratory operations. The court of appeals' failure to focus on this fact renders the injunction ordered by the court indefensible. Interior made explicit findings that exploration would not significantly restrict subsistence resources in the two sale areas (see App. 85a, 90a, 92a, 95a, 98a, 99a, 101a, 103a, 106a, 108a-115a), and those findings have not been challenged by the villages or questioned by either court below. Indeed, the district court explicitly found that the injury that Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from exploration activities (App. 43a). In these circumstances, it is difficult to perceive what role the injunction mandated by the court of appeals will play in preventing irreparable injury to the

[8] We note that the asserted violations in this case were plainly insubstantial. In the Lease Sale 83 case, for example, the district court found that the Secretary had "considered the relevant factors" required by Section 810 and had not erred in finding that the lease sale and subsequent stages of the OCS process, including development and production, would have "negligible" or "nonexistent" impacts on subsistence uses (App. 41a-42a). Nevertheless, the district court and the court of appeals found a violation of Section 810 solely because the Secretary made his subsistence findings pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, rather than Section 810 of ANILCA, and thus did not have the policy precepts of Section 810 "clearly in mind" (App. 8a, 38a).

villages during the pendency of this case or in curing any asserted violation of ANILCA associated with the lease sales. Cf. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-408 & n.16 (1976).

On the other hand, as the district court found (App. 43a), an injunction against exploratory activities causes irreparable harm to the congressionally-mandated goal of expedited exploration and development of the OCS. See 43 U.S.C. 1802(1) and (9). As the dissent further recognized (App. 30a), an injunction at the beginning of the 1985 season would have caused huge unrecoverable monetary losses to the intervenor oil companies, whose expenditures were made in reliance upon the Secretary's unchallenged approvals of their exploration plans. In sum, the application of the per se injunction rule in this case has led to a requirement of injunctive relief that serves no purpose other than the infliction of harm to the public and private interests involved.

The court of appeals' automatic injunction rule cannot be squared with *Romero-Barcelo*. The court was simply wrong in asserting (App. 23a n.2) that the "injunctive relief we grant is the only means of insuring compliance under section 810." Even if we assume that Section 810 applies to the OCS at all (but see pages 20-25, *infra*), an order directing Interior to come into compliance with that Section would be at least as effective as the order issued by the district court in *Romero-Barcelo*, which merely directed the Navy to apply for a discharge permit under the Clean Water Act (see 456 U.S. at 309-310).

The court of appeals also erred in concluding (App. 23a n.2) that *TVA* v. *Hill*, 437 U.S. 153 (1978), rather than *Romero-Barcelo*, governs this case. As the Court made clear in *Romero-Barcelo*, 456 U.S. at 313, *Hill* involved a situation in which "Congress had foreclosed the exercise of the usual discretion possessed by a court of equity." The Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, at issue in *Hill*, expressly barred any federal action that

would destroy a critical habitat, and it was undisputed that closing the gates of the Tellico Dam would have done just that (*Hill*, 437 U.S. at 173-174). Unlike the provision of the ESA at issue in *Hill*, however, Section 810 of ANILCA is purely procedural. See *Kunaknana* v. *Clark*, 742 F.2d 1145, 1150 (9th Cir. 1984). Rather than forbidding any interference with subsistence uses, Section 810 expressly permits a federal action that *will* restrict subsistence uses to go forward so long as the procedural requirements of the Section have been satisfied (see Section 810(d) of ANILCA, 16 U.S.C. 3120(d); App. 64a).[9] Furthermore, the district court found that exploration "will not significantly restrict subsistence resources" (App. 43a), and the court of appeals did not disturb that finding. Hence, *Hill* is inapplicable to this case, and the general rules of equity jurisprudence, as set forth in *Romero-Barcelo*, apply with full force.

Finally, the court of appeals' attempt (App. 23a n.2) to distinguish *Romero-Barcelo* on the basis that it involved a permanent rather than a preliminary injunction is totally unconvincing. Indeed, that distinction cuts the other way, because, at the preliminary injunction stage, the parties have not had a full opportunity to present their arguments and the primary concern of the court is to preserve the status quo. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 395-396 (1981). Clearly, there is no rational

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[9] Thus, there is no support for the court of appeals' statement (App. 23a n.2) that "in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration." Congress merely intended to integrate subsistence considerations into public land management planning decisions. As the Senate Report on ANILCA stated, "once the requirements of [Section 810] are satisfied and incorporated into existing land use planning processes the proposed action may proceed even though its effect may be adverse to subsistence uses." S. Rep. 96-413, 96th Cong., 1st Sess. 234 (1979).

basis for giving a district court less rather than more discretion and flexibility when considering whether to grant preliminary relief.

b. The ruling below conflicts with decisions from numerous other circuits. The court of appeals acknowledged (App. 16a) that "the D.C. Circuit Court apparently does not follow the Ninth Circuit rule that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances." Indeed, in *Alaska* v. *Andrus*, 580 F.2d 465, 485-486 (D.C. Cir.), vacated in part on other grounds as moot *sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978), the court refused to void OCS leases and enjoin exploration, despite NEPA violations, noting that exploration posed a "risk [that] is simply too small and too speculative to justify the imposition of an injunction * * *." In *Wisconsin* v. *Weinberger*, 745 F.2d 412, 425-426 (7th Cir. 1984), the court of appeals reversed the grant of an injunction premised on NEPA violations, holding that a "presumption of harm" analysis similar to that employed by the Ninth Circuit was contrary to *Romero-Barcelo* and "[t]he recent trend of the majority of courts * * *." Indeed, there appears to be no other circuit that follows the Ninth Circuit's per se injunction rule. See *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (emphasis in original) ("This is not to say that a likely NEPA violation automatically calls for an injunction; the *balance* of harms may point the other way."); *United States* v. *Lambert*, 695 F.2d 536, 539-540 (11th Cir. 1983) (government not entitled to preliminary injunction despite showing of probable violation of Clean Water Act); *Sierra Club* v. *Hennessy*, 695 F.2d 643, 648-649 (2d Cir. 1982) ("A violation of NEPA does not necessarily require a reflexive resort to the drastic remedy of an injunction."); *Environmental Defense Fund* v. *Marsh*, 651 F.2d 983, 1005-1006 (5th Cir.

1981); *Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1323 (8th Cir. 1974); *Ohio ex rel. Brown* v. *Callaway*, 497 F.2d 1235, 1240 (6th Cir. 1974).

The Ninth Circuit, on the other hand, has taken to applying its per se rule with increasing frequency. See, *e.g.*, *Tenakee Springs* v. *Block*, 778 F.2d 1402, 1407-1408 (1985); *Steamboaters* v. *FERC*, 777 F.2d 1384 (1985); *Thomas* v. *Peterson*, 753 F.2d 754, 764 (1985); *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (1984). The rule presents a serious and continuing problem for countless federal projects and programs and is so far divorced from the equitable inquiry required by *Romero-Barcelo* and followed by the other circuits that certiorari is warranted.[10]

2. As we shall show (see pages 22-25, *infra*), Congress never intended ANILCA to apply to the OCS. The Ninth Circuit's contrary ruling raises several issues of grave importance for the OCS program. *Gambell I* extended this public lands statute to the OCS on the theory that the "ambiguous language" defining the Act's scope should be construed in favor of Natives, who, along with other rural residents of Alaska, are the beneficiaries of the legislation (App. 62a-64a). This ruling has a number of bizarre consequences, including the possibility of state jurisdiction over the fish and wildlife of the OCS, an area of exclusive federal jurisdiction. Compare App. 64a n.9 with *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 479-480 n.7 (1981). *Gambell II* goes further, by extending the reach of the Act to an area so far from land (the Navarin Basin) that it is not even used for Native subsistence purposes.

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[10] Subsequent to the court of appeals' decision in this case, yet another OCS sale off Alaska has been preliminarily enjoined, based on the district court's conclusion that Ninth Circuit precedent left the court "without discretion" to deny injunctive relief once the plaintiffs had shown a likelihood of success on the merits. *Tribal Village of Akutan* v. *Hodel*, No. A85-701 (D. Alaska Jan. 13, 1986), slip op. 4, appeal pending, No. 86-3512 (9th Cir.). See also note 14, *infra*.

Gambell II rules that *Gambell I* will be applied retroactively and at the same time forbids any argument that pre-*Gambell I* subsistence studies performed under other statutes may have fulfilled the purposes of Section 810. Taken together with the rejection of the government's laches defense (App. 25a-26a), these rulings put at grave risk the 621 leases issued offshore Alaska since the enactment of ANILCA on December 2, 1980, and threaten the loss of over $4.2 billion in bonuses received for those leases. In addition, by rejecting without discussion the government's argument that exploration activities conducted pursuant to approved exploration plans may not be challenged outside the 60-day review period provided by 43 U.S.C. 1349(c)(3), *Gambell II* upsets the carefully limited judicial review procedures of the OCSLA for this stage of the OCS process (see page 4, *supra*) and threatens to disrupt exploration under the 26 exploration plans currently in effect on the OCS offshore Alaska.

The prospective effect of *Gambell I* and *II* is equally serious. It is clear that the only stage of the OCS process at which there might ever be significant restrictions on subsistence uses is the development and production stage (see App. 43a). Yet *Gambell II* rules that the likelihood of a significant restriction on subsistence uses at that stage requires Interior to determine at the leasing stage that development and production "will involve the minimal amount of public lands necessary to accomplish the purposes of such * * * disposition" and that "reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources * * *." 16 U.S.C. 3120(a)(3)(B) and (C). But it is impossible, before knowing whether and where recoverable resources exist and how lessees propose to develop them, to make any informed judgment regarding the minimal amount of land necessary for OCS development and how best to minimize production stage impacts.

The net effect of the court of appeals' ruling is to encourage litigation at the lease sale stage over impacts that will flow, if at all, only from the development and production stage. See, *e.g.*, *Tribal Village of Akutan* v. *Hodel*, No. A85-701 (D. Alaska Jan. 13, 1986), appeal pending, No. 86-3512 (9th Cir.). But such litigation is precisely what Congress sought to preclude when it divided the OCS process into discrete stages. *Secretary of the Interior* v. *California*, 464 U.S. at 341. In light of the significant burdens that the court of appeals' decision will place on the OCS program, this Court should reverse the Ninth Circuit's unwarranted seaward extension of ANILCA.[11]

a. Section 810 applies only to the disposition of "public lands." By itself, that phrase does not in the least suggest application to the OCS. See, *e.g.*, *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894) (tidelands are not "public lands"); *Bardon* v. *Northern Pacific R.R.*, 145 U.S. 535, 538 (1892) ("by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws"). The OCS, of course, has never been open to sale or disposition under the general land laws. In *Justheim* v. *McKay*, 229 F.2d 29, 30-31 (D.C. Cir. 1956), for example, the court held that submerged lands within three miles of shore are not "public lands" subject to disposition under the Mineral Lands Leasing Act, 30 U.S.C. 181 *et seq.*

Any doubt as to the meaning of "public lands" is dispelled by the definition of the phrase contained in Section 102(3) of ANILCA, 16 U.S.C. 3102(3). Subject to certain exceptions not relevant here, the statute provides that

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[11] *Gambell I* left several issues open for consideration on remand (App. 65a), and there is thus no bar to this Court's review of its holding, together with the issues decided in *Gambell II*. See *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); see also *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973).

"public lands" are "land[s] situated in Alaska which * * * are Federal lands." "Federal land" is defined in Section 102(2), 16 U.S.C. 3102(2), to mean "lands the title to which is in the United States * * *." Thus, the OCS can be "public lands" subject to Section 810 only if it is "in Alaska" and if title thereto is in the United States. Neither condition obtains. The OCS is, by definition, outside the boundaries of Alaska. See 43 U.S.C. 1301(a), 1331(a). Furthermore, the United States asserts only "sovereign rights [over the OCS] for the purpose of exploring and exploiting its natural resources," Convention on the Continental Shelf, *done* Apr. 29, 1958, art. 2, para. 1, 15 U.S.T. 471, 473, T.I.A.S. No. 5578; it does not claim "title or ownership in the conventional sense." *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); see also *United States* v. *Maine*, 420 U.S. 515, 517 (1975); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339-340 (5th Cir. 1978).[12] Thus, the plain language of the Act clearly demonstrates that Congress did not intend "public lands" as used in Section 810 to include the OCS.[13]

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[12] The Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, carefully distinguished the "title" to the seabed granted to the states from the "jurisdiction and control" over the OCS retained by the federal government. 43 U.S.C. 1302, 1311(a)(1), 1314(a).

[13] The court of appeals relied (App. 61a) on the fact that the term "public lands" had in one case been read to apply to a particular Alaska Native offshore fishery. See *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110-116 (1949). In *Hynes*, the Court considered a statute that authorized the Secretary of the Interior to designate as an Indian reservation in Alaska "any * * * public lands which are actually occupied by Indians or Eskimos within said Territory." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. The Secretary relied upon this grant of authority to extend the boundaries of an Indian reservation 3,000 feet from the shore line at mean low tide (337 U.S. at 90 n.1). The fishery thereby included in the reservation was "within [the] Territory" (which extended three miles offshore) and lay over land owned by the

The Ninth Circuit found "compelling" (App. 59a) the argument that Section 810 of ANILCA should have the same geographic scope as the extinguishment of aboriginal title effectuated by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* That argument, however, is seriously flawed. First, the court of appeals simply "assume[d] rather than deciding" that Alaska Natives had aboriginal rights on the OCS (App. 45a n.1). The district court, however, had convincingly rejected (App. 69a) the notion that aboriginal rights ever could have arisen on the OCS, because in that area " '[p]roperty rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign.' " *Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182, 186 (D. Alaska 1982), aff'd on other grounds, 746 F.2d 570 (9th Cir. 1984) (companion case to *Gambell I*) (App. 66a-67a), cert. denied, No. 84-1801 (Oct. 7, 1985), quoting *United States* v. *Texas*, 339 U.S. 707, 719 (1950). Second, in recognition of the fact that Alaska Natives had nonetheless made claims to portions of the OCS, the drafters of ANCSA inserted into the extinguishment provision of the Act, 43 U.S.C. 1603(b), a reference to "submerged land underneath all water areas, both inland and offshore" (see App. 53a-54a). The absence of similar language in ANILCA shows that Congress did not intend that Act to apply to the OCS. Third, ANCSA extinguished aboriginal claims to federal, state, and private lands (43 U.S.C. 1603(c)), but Section 810 of ANILCA applies only to lands to which the federal government holds title. Moreover, ANCSA addressed the claims of Alaska Natives, while Section 810 of ANILCA extends to all "rural residents" of Alaska. 16 U.S.C. 3101(c). Thus, the court of appeals erroneously relied (App. 62a-63a) on the principle that statutory ambiguities

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United States. In contrast, the OCS is not in Alaska, and the federal government does not claim title to it. Clearly, the interpretation of "public lands" in *Hynes* has no application to the OCS.

should be resolved in favor of the Natives. In sum, it is plain that Congress never intended Section 810 of ANILCA to have the same geographic scope as ANCSA or for the two statutes to be read in pari materia.

The court of appeals in *Gambell I* relied on scattered statements in the legislative history of ANILCA that OCS lands were "in Alaska" (App. 58a). These statements, however, did not in any way relate to the scope of the Act. When discussing that question, the drafters of ANILCA made clear that "this legislation has nothing to do with" the OCS (125 Cong. Rec. 11170 (1979) (remarks of Rep. Emery)) and that the bill would not affect offshore oil lands, which were instead regulated by "OCS legislation" (125 Cong. Rec. 11128 (1979) (remarks of Rep. Udall)). In fact, Congress specifically rejected several proposals to extend provisions of ANILCA to the OCS. See *Hearings on H.R. 39 Before the Subcomm. on General Oversight and Alaska Lands of the Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. Pt. XIII, at 236 (1977) (proposal by Association of Village Council Presidents to extend Yukon Delta Wildlife Refuge 200 miles offshore); see also S. Rep. 95-1300, 95th Cong., 2d Sess. 112 (1978) (rejecting attempt to extend the Act to a six-mile "seaward zone"). These proposals were rejected because ANILCA "was intended to be a land bill" (124 Cong. Rec. 18025 (1978) (remarks of Sen. Stevens)), and because they would have upset the existing statutory regime governing the oceans, which was better suited to protecting ocean resources (*id.* at 18026). By its unwarranted extension of Section 810 of ANILCA to the OCS, the Ninth Circuit has brought about the very confusion and conflict that Congress sought to avoid by making ANILCA a "land bill."

b. Even if we assume arguendo that ANILCA applies to the OCS at all, the court of appeals nevertheless erred when it held that Interior could not comply with the statute by employing the stage-by-stage evaluation pro-

cedures approved by this Court in *Secretary of the Interior* v. *California, supra.* In that case, this Court reversed the Ninth Circuit's ruling that the Secretary of the Interior was required to comply with Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1456(c)(1), at the lease sale stage because decisions made then influence or determine the nature of impacts at later stages. See *California* v. *Watt*, 683 F.2d 1253, 1260 (9th Cir. 1982), rev'd, 464 U.S. 312 (1984). In doing so, this Court relied heavily on the fact that Congress had made the stages of the OCS process separate and distinct in order "to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production." 464 U.S. at 341 (footnote omitted).

The Ninth Circuit has once again thwarted Congress's purposes by holding that it will require hearings and findings pursuant to Section 810(a)(1)-(3) of ANILCA prior to a lease sale if it appears that the proposed disposition of public lands "would significantly restrict subsistence uses" (16 U.S.C. 3120(a)) at the development and production stage (App. 12a-13a).[14] The court of appeals tried to paper over the evident conflict with *Secretary of the Interior* v. *California* by pointing out (App. 13a) that that case dealt with the CZMA, rather than ANILCA. However, it is the 1978 amendments to the OCSLA that created the unique

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[14] The procedural requirements of Section 810(a)(1)-(3) are triggered only when the proposed disposition of public lands "*would* significantly restrict subsistence uses" (16 U.S.C. 3120(a) (emphasis added)). In *Gambell II*, the Ninth Circuit substituted the word "may" for "would" in describing the statutory standard. App. 13a. In *Tribal Village of Akutan* v. *Hodel, supra*, the district court interpreted the language used in *Gambell II* as triggering Section 810's procedural requirements upon a showing of a "mere possibility" of a restriction on subsistence uses. The government's pending appeal from that ruling asks the court of appeals to rectify the district court's erroneous reading of the plain statutory language. See note 10, *supra*.

stage-by-stage nature of the OCS process, and that framework must be respected in analyzing Interior's obligations under ANILCA as well as under the CZMA and other environmental statutes.[15] The conflict with *Secretary of the Interior* v. *California* is plain and warrants this Court's review.

c. The court of appeals conceded that the decision in *Gambell I* established a new principle of law, but reasoned that retroactive application of that decision was nevertheless warranted because it "would further the operation" of Section 810 and would not lead to "substantial inequitable results" (App. 24a). The Ninth Circuit's decision, while referring to this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), totally distorts the retroactivity analysis spelled out in that case. First, it is impossible rationally to conclude that applying *Gambell I* to Lease Sale 83, which took place six months before that decision without any litigation challenge, furthers the purposes of Section 810. Despite the fact that no Native subsistence activity takes place in the Lease Sale 83 area, Interior carried out a substantial pre-leasing analysis of subsistence uses (see page 7, *supra*). The district court specifically found that the factors specified in Section 810(a) were considered, albeit not with ANILCA "clearly in mind" (App. 38a, 42a). After *Gambell I*, Interior prepared Section 810 analyses for each approved exploration plan, and those plans have never been challenged. Interior also announced that it would prepare new subsistence evaluations should development and production

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[15] Indeed, the court of appeals' assertion that *Secretary of the Interior* v. *California* is limited to the CZMA conflicts with another Ninth Circuit decision, *Village of False Pass* v. *Clark*, 733 F.2d 605 (1984), which rejected claims that a lease sale had been conducted in violation of the Endangered Species Act and NEPA, because those claims ignored the stage-by-stage nature of the OCS process (733 F.2d at 608-609, 611, 614-616).

ever be proposed. In these circumstances, requiring Interior to reconsider subsistence issues as they pertain to the initial decision to lease serves no possible policy interest.

If retroactive application of *Gambell I* were to lead to a voiding of leases (a question left open in *Gambell II*), the financial impact on the federal government could be enormous (see page 21, *supra*). The court of appeals clearly erred in concluding (App. 25a) that Interior brought this potential outcome on itself. It is unreasonable in the extreme to suggest that Interior should have altered its course with respect to Lease Sale 83 based on the possibility that the villages in the Lease Sale 57 action might obtain a reversal of the district court's decision holding that ANILCA did not apply to the OCS. Retroactive application of *Gambell I* is clearly inequitable.

CONCLUSION

The petition for a writ of certiorari should be granted, together with the petition in No. 85-1239, and the two cases consolidated for purposes of oral agrument.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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